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No. 78-231

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS C. HARPER, PETITIONER

v.

J. ARNOLD FELDMAN AND DEAN STANTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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1. Petitioner brought this action against two fellow employees of the Small Business Administration who, he alleges, unlawfully made public information compiled on him in the course of an internal SBA investigation. He contends that he is entitled to damages for the alleged defamation.

The circumstances at issue here grew out of a racial discrimination proceeding initiated by respondent Stanton. Stanton, an employee of the Office of

Minority Small Business at the SBA, was notified in 1975 that he would be fired because he had written two bad checks while traveling on agency business.[1] He consulted with other employees of the agency, including respondent Feldman, on whether and how to resist his discharge (Stanton Affidavit). Feldman was at the time the chief of the compliance division of the Office of Equal Employment and Compliance, Deputy Civil Rights Coordinator for the agency, a counsellor for troubled employees, and a former president of the employees' union (Respondent Feldman's Motion to Dismiss Or in the Alternative for Summary Judgment, Attachment B ["Feldman Affidavit"]).

Feldman told Stanton that other employees of the agency had had far more serious financial problems that had not resulted in discharge. The two apparently discussed the case of petitioner, who had been investigated by the SBA two years before, after he allegedly had accumulated a large debt to a restaurant that was seeking an SBA loan. Petitioner was at the time allegedly urging that the agency make the loan. Feldman was petitioner's supervisor and was therefore familiar with the results of the investigation. He recommended that petitioner be fired, but one Higgins, at the time Feldman's superior, merely gave petitioner a reprimand. Higgins was

[1] The checks had been dishonored because SBA employees had not deposited one of Stanton's paychecks into his checking account, as he had expected. When Stanton learned of the error, he promptly made restitution (Respondent Stanton's Motion for Summary Judgment, Exhibit B ["Stanton Affidavit"]).

the same official who later fired Stanton (Feldman Affidavit).

As a result of this and other discussions, Stanton filed a discrimination complaint with the agency, alleging that he had been fired because of his race.[2] In the course of the ensuing SBA investigation, Stanton and Feldman both provided affidavits in support of the charge of discrimination that recounted, among other things, petitioner's story.[3] Petitioner learned of the statements and in May and June of 1976 wrote letters to the SBA Director of Personnel demanding that the accounts of his case be removed from the Stanton investigatory file and that Feldman be disciplined. Petitioner filed a complaint in the Superior Court of the District of Columbia, for "slander, libel, invasion of privacy, and damages" against Feldman and Stanton.[4] The case was removed to the federal

[2] Stanton and Feldman are white; Higgins and petitioner are black.

[3] The SBA ultimately concluded that Stanton's discharge was not racially motivated. Stanton filed suit against the agency under 42 U.S.C. (Supp. V) 2000e-16. By stipulation and consent decree, he was reinstated to his former job, retroactive to the date of his discharge. *Stanton* v. *Kobelinski*, No. 76-2306 (D. D.C. Feb. 16, 1977).

[4] On July 20, 1976, petitioner had filed a similar suit in the district court. The district court dismissed that case *sua sponte* on October 20, 1976, after petitioner failed to comply with an order to amend his complaint to set out a basis of federal jurisdiction.

On August 5, 1976, petitioner filed an additional suit against Mitchell Kobelinski, Administrator of the SBA, and others, alleging violations of the Privacy Act, 5 U.S.C. 552a, and

district court under 28 U.S.C. 1442(a)(1), and the district court, holding that the suit is barred by absolute immunity under *Barr* v. *Matteo*, 360 U.S. 564 (1959), entered summary judgment for the respondents (Pet. App. 3a). The court of appeals affirmed without opinion (Pet. App. 1a).

2. This case is controlled by *Barr* v. *Matteo*, *supra*, and *Expeditions Unlimited Aquatic Enterprises* v. *Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977) (en banc), cert. denied, No. 76-418 (July 3, 1978). *Barr* and *Expeditions* hold that government officials have absolute immunity from damages for defamation allegedly occurring in the course of official duties. This aspect of *Barr* remains the law after *Butz* v. *Economou*, No. 76-709 (June 29, 1978). This Court made it clear in *Butz* that its decision was limited to suits alleging deprivations of constitutional rights (slip op. 27), and that absolute immunity in defamation actions still is appropriate.

Petitioner asserts that the courts below decided that absolute immunity exists even where the official in question has violated a statutory standard, and that such a ruling is contrary to *Butz* v. *Economou*. But petitioner's complaint asserts no cause of action

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seeking an injunction against any use of the disputed material allegedly taken from his investigatory files. Summary judgment for the Administrator was granted September 30, 1976, when petitioner failed to answer a motion arguing, among other things, that he had failed to exhaust his administrative remedies under the Privacy Act. This case was consolidated on appeal with the instant case but has not yet been decided by the court of appeals.

against Stanton and Feldman under a federal statute.[5] It alleges, instead, that they committed "slander, libel, invasion of privacy and damages" (Complaint at 1). The complaint consequently states a claim under the common law, but no more.

There is, moreover, no reason to allow an action against federal employees in a case such as this. The Privacy Act, 5 U.S.C. 552a(g), creates a right to an injunction to remove defamatory materials from personnel files. Petitioner's suit under this provision is pending (see note 4, *supra*). If the agency acted willfully or intentionally—as petitioner alleges it did—he could also recover damages of at least $1000 plus costs under Section 552a(g)(4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

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[5] See note 4, *supra*. And any such allegation would fail to state a claim on which relief could be granted. See *Cell Associates* v. *National Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978).

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